Filed 4/6/09 P. v. Spigner CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VERTIS DENVER SPIGNER, JR., Defendant and Appellant.	F053344 (Super. Ct. No. 5684) **OPINION**

APPEAL from a judgment of the Superior Court of Mariposa County. Edward M. Lacy* and Wayne R. Parrish, Judges.

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Brian Alvarez and Sarah J. Hopper, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

*Retired judge of the Stanislaus Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Appellant Vertis Denver Spigner, Jr., having ingested cocaine, drove his vehicle across the double yellow lines of a highway and struck a truck, killing the truck's driver and injuring the passenger in his own vehicle. A jury found appellant guilty of gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)) and driving under the influence causing injury (Veh. Code, § 23153, subd. (a)). It found true the allegations that appellant caused bodily injury to more than one victim (Veh. Code, § 23558) and that he caused great bodily injury to a person older than 70 years of age (Pen. Code, § 12022.7, subd. (c)). Appellant pled no contest to one count of driving when privilege is suspended or revoked (Veh. Code, § 14601.1, subd. (a)) and admitted that he was on bail on his own recognizance at the time the offenses occurred (Pen. Code, § 12022.1). The court sentenced appellant to imprisonment for ten years four months and imposed various fines and penalty assessments.

On appeal, appellant contends: (1) the evidence is insufficient to show he was driving under the influence of cocaine; (2) the trial court abused its discretion when it allowed an expert to opine that appellant's driving pattern demonstrated he was under the influence of cocaine; (3) the trial court erred when it denied his request for change of venue; and (4) the cause must be remanded to correct the abstract of judgment. We agree only that the cause must be remanded to correct the abstract of judgment. In all other respects, we affirm the judgment.

FACTS

At approximately 4:25 p.m. on October 25, 2006, Thomas Holt, a construction worker, was driving on Highway 49 near Mariposa, heading back to his shop to unload tools from his truck. Holt's coworker, Jovian Miller, was driving in a separate vehicle directly behind Holt.

Edmond Guenette and his wife were also driving on Highway 49 near Mariposa. Directly in front of them was appellant's vehicle, a 2005 Honda Accord. The Guenettes noticed appellant's vehicle "veer" about two feet across the double yellow line and

continue to drive in the oncoming traffic lane for about 100 to 200 yards. Appellant then veered back into his own lane. The Guenettes watched appellant cross into the oncoming lane approximately 10 to 20 times in a four- to five-mile stretch of highway. Mr. Guenette was concerned for his own safety and increased the distance between his vehicle and appellant's. Suddenly, appellant veered across the double yellow line and hit Holt's vehicle head-on at approximately 50 miles per hour.

Holt was killed instantly. Appellant's 77-year-old mother, Levy Ann Spigner, who was a passenger in appellant's car, suffered a fractured leg, ankle, and wrist in the accident. She testified that she did not know if appellant crossed the double yellow line. Appellant's injuries included a fractured right ankle and left shin. A blood sample was taken from appellant three hours after the collision and booked into evidence.

Officer Rebecca Hagen of the California Highway Patrol interviewed appellant six days after the accident when he was being discharged from the hospital. When asked, appellant denied ever using any drugs. Asked to explain why his blood tested positive for cocaine, appellant stated that, two days before the accident, he was in an enclosed room with a friend who was smoking cocaine, but that he did not smoke it. Appellant then admitted to Officer Hagen's partner that he had smoked cocaine two days before the crash. Officer Hagen examined appellant and noticed that he had deep grooves on his tongue and tonsils and darkening of the tongue, all indicative of an individual who habitually smoked cocaine.

Officer Hagen testified that she had been an officer for over six years, had specialized training in collision investigation and driving under the influence of alcohol or controlled substances, and was certified by the National Highway Traffic Safety Administration as a drug recognition expert. She had personally arrested more than 200 impaired drivers.

Two experts testified for the prosecution. The first, Ronald Kitigawa, a forensic toxicologist with the California Department of Justice for over 20 years, had testified as

an expert over 110 times. Kitigawa testified that a toxicology screen performed on appellant's blood sample October 31, 2006, six days after the accident, tested positive for cocaine and its byproduct, benzoylecgonine. At that time, appellant's blood had approximately 20 nanograms of cocaine per milliliter. Kitigawa testified that cocaine deteriorates rapidly once ingested and would be difficult to detect 8 to 10 hours after it is ingested. According to Kitigawa, it is only possible to measure the level of cocaine in the blood at the time it is tested; the level of cocaine in appellant's blood at the time of the collision can only be estimated.

Kitigawa opined that appellant had used cocaine recently before his blood draw because cocaine was detected in his blood. According to Kitigawa, cocaine equally impairs judgment on both the euphoric stage and the "crashing" withdrawal stage of cocaine use, which includes fatigue. Kitigawa opined, based on a hypothetical question similar to the facts of appellant's case, that the driving behavior was consistent with someone under the influence of cocaine. Kitigawa testified that the impaired driving was likely based on the stimulant aspect of the cocaine wearing off and fatigue taking over.

The second expert, Maureen Black, had been a toxicologist for over 25 years, had attended many human performance workshops discussing the effects of drugs, and had testified approximately 900 times, at least half related to driving issues. Black had previously testified as an expert regarding driving impairment as a result of cocaine use.

Black had appellant's blood sample tested on December 22, 2006, approximately two months after the accident. The test result revealed approximately nine nanograms of cocaine per milliliter and 757 nanograms of benzoylecgonine per milliliter. According to Black, about a third of the cocaine in the sample is lost in about three weeks' time, due to spontaneous hydrolysis. Black testified that this meant appellant had active cocaine in his blood at the time of the blood draw, and she opined that the level of cocaine in appellant's blood at the time of the collision was at least 80 nanograms of cocaine per

milliliter. Black opined, based on a hypothetical question similar to the facts of appellant's case, that such a person was under the influence of cocaine while driving.

Dr. Eugene Schoenfeld testified for the defense as a medical doctor and specialist in drug addiction. According to Dr. Schoenfeld, between 9 and 36 nanograms of cocaine in the bloodstream would "not make someone an unsafe driver," since cocaine is a performance enhancing drug. He also testified that if someone used cocaine two days before blood was drawn, it could register nine nanograms per milliliter.

Appellant's mother testified that, at the time of the accident, appellant was eating a burrito left over from lunch. He had his burrito in his left hand and was driving with his right. The last thing appellant's mother remembered before the accident was that appellant reached over for a container of soup, also left over from lunch.

DISCUSSION

1. Sufficiency of Evidence

Appellant contends the evidence is insufficient to show that he was driving under the influence of cocaine. Instead, he argues that the evidence "clearly demonstrated" that his careless driving was the result of eating in the car. He also argues that he was not "under the influence" of cocaine, but in "withdrawal," according to case law interpretation of Health and Safety Code section 11550. We disagree.

When sufficiency of the evidence is challenged,

> "… we look to whether there is substantial evidence in the record in support of the questioned element of the charged offense. [Citations.] It is not our function to decide whether the evidence proves the existence of that element beyond a reasonable doubt, as that finding and weighing of the evidence has already been performed by the trier of fact at the trial level. [Citations.] We review the whole record in the light most favorable to the judgment and presume in support of the judgment every fact the trier could reasonably deduce from the evidence. [Citations.]" (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 492.)

Being "under the influence" is a necessary element of both counts of which appellant was convicted. (Pen. Code, § 191.5, subd. (a) [unlawful killing in the driving

of a vehicle, "where the driving was in violation of" Veh. Code, § 23153]; Veh. Code, § 23153, subd. (a) [driving "while under the influence of any alcoholic beverage or drug"].) "Under the influence" means that as a result of using a drug a person's physical or mental abilities are impaired so that he/she no longer has the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence, under the same or similar circumstances. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1251; see Veh. Code, § 312.)

Appellant cites to *People v. Gutierrez* (1977) 72 Cal.App.3d 397 for the proposition that he was in "withdrawal" and not "under the influence," and therefore not in violation of Vehicle Code section 23152, subdivision (a). In *Gutierrez*, in a misdemeanor prosecution for use of an opiate, the trial court denied the defendant's pretrial motion to suppress evidence of about 17 puncture wounds on his arms, the most recent being two days old. The officer had asked the defendant to remove his coat after observing two small brown scab marks on his hands and signs of withdrawal, such as wateriness and dilation of the eyes, sniffling, and yawning. (*Id.* at pp. 400-401.) On appeal, the defendant argued that the evidence was obtained from an illegal search. The appellate department of the superior court and the Court of Appeal agreed, holding that the fact that a person is observed to be experiencing withdrawal symptoms does not establish reasonable cause to believe that a violation of Health and Safety Code section 11550 (the use or being under the influence of a narcotic) is being committed in the presence of the observer. (*Gutierrez*, at pp. 401-402.)

But *Gutierrez* is not helpful to appellant. In *Gutierrez*, the court analyzed the term "under the influence" only in regards to Health and Safety Code section 11550, not Vehicle Code section 23152, subdivision (a). As explained in *People v. Enriquez* (1996) 42 Cal.App.4th 661,

> "The term 'under the influence' differs for the purposes of [Vehicle Code] section 23152, subdivision (a) and Health and Safety Code section 11550. 'To be "under the influence" within the meaning of the Vehicle Code, the

> … drug(s) must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree *the ability to operate a vehicle* in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties. [Citations.] In contrast, "being under the influence" within the meaning of Health and Safety Code section 11550 merely requires that the person be under the influence in any detectable manner. The symptoms of being under the influence within the meaning of that statute are not confined to those commensurate with misbehavior, nor to those which demonstrate impairment of physical or mental ability. [Citation.]' [Citations.]" (*People v. Enriquez*, *supra*, 42 Cal.App.4th at p. 665; see also *People v. Canty* (2004) 32 Cal.4th 1266, 1278-1279.)

In this case the jury could reasonably conclude, beyond a reasonable doubt, that appellant was driving under the influence. Appellant had cocaine in his blood. The level of cocaine in appellant's blood, taken three hours after the collision, was 20 nanograms per milliliter. Witnesses saw appellant repeatedly veer over the double yellow line before he hit Holt's vehicle head-on at 50 miles per hour. As described by the experts, these circumstances were consistent with the nature of cocaine, which deteriorates rapidly in the blood once ingested, and with symptoms of cocaine influence, as evidenced by appellant's impaired judgment and fatigue. A reasonable jury could conclude from all the circumstances that appellant's driving was influenced by his ingestion of cocaine. (See *People v. Andersen*, *supra*, 26 Cal.App.4th at pp. 1252-1253.)

2. Expert Witness

Appellant contends that the trial court abused its discretion in allowing Maureen Black, an expert witness in toxicology, to "opine as to specific driving patterns" because there was no testimony that she had any training in cocaine-impaired driving. He contends further that Black's opinion testimony was prejudicial in that there is a reasonable probability that, absent her testimony, the jury would have reached a more favorable result. We disagree.

Black, a toxicologist, testified as an expert witness without objection from appellant. During questioning, the prosecutor asked Black a hypothetical question: If a person started driving at 10:00 a.m., was seen five hours later driving across the center

line repeatedly over a four-mile stretch of highway, and suddenly crossed the line and hit another car head-on, and, if that person admitted smoking cocaine two nights before, a blood sample drawn three hours after the collision showed a measurable amount of cocaine, and the blood sample measured at nine nanograms per milliliter two months later, did Black have an opinion as to whether the person was under the influence of cocaine at the time of the collision. In response, Black stated, "My opinion is that this person was under the influence of the cocaine at the time that that person was driving and this event occurred."

Defense counsel objected to the hypothetical, stating that he did not believe Black's training "qualified her to state an opinion based upon the hypothetical for my specific client" because "a BA degree and on-the-job training" did not qualify her to give that type of opinion. The court overruled defense counsel's objection, stating:

> "Ms. Black testified from her education, experience, training she's been giving these type of opinions for the last 25 years qualifying on many, many times to testify. She testified besides her training and actually testing blood and finding the substances, determining the amounts, the training included human performance workshops. She gave a number of items that she would like to consider in rendering opinion, driving pattern, field sobriety tests, conduct, admissions, test results. All of those together would be ideal. Obviously that was not … permissible here because of [appellant's] condition following the crash. [¶] Based on her experience and training and the facts that she did have to rely upon the Court feels that in view of the evidence code definition of expert witness and what the expert witness has to know about compared with those people in the general public, she qualifies to give that opinion."

Generally speaking, a witness may testify only about matters of which he or she has personal knowledge. (Evid. Code, § 702, subd. (a).) An expert witness, on the other hand, is one who has special knowledge, skill, experience, training, or education sufficient to qualify as an expert on the subject to which his or her testimony relates. (*Id.*, § 720, subd. (a).) "The test in each case is whether the witness has sufficient skill or experience in the particular field so that his testimony would be likely to assist the jury in

the search for the truth." (*Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 385.)

> "[T]he question whether a witness qualifies as an expert is a matter addressed in the first instance to the sound discretion of the trial court. [Citation.] It is also elementary, however, that the court will be deemed to have abused its discretion if the witness has disclosed sufficient knowledge of the subject to entitle his opinion to go before the jury. [Citation.]" (*Brown v. Colm* (1974) 11 Cal.3d 639, 646-647; see also *People v. Roberts* (1992) 2 Cal.4th 271, 298; *People v. Page* (1991) 2 Cal.App.4th 161, 187.)

If a witness has disclosed sufficient knowledge of the subject to allow the witness's opinion to go to the jury, "the question of the degree of his knowledge goes to the weight of his testimony rather than to its admissibility." (*Brown v. Colm*, *supra*, 11 Cal.3d at p. 643.)

An expert may render opinion testimony on the basis of facts given in a hypothetical question that asks the expert to assume their truth. But such a hypothetical question must be rooted in facts shown by the evidence. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

Our task in reviewing a trial court's order for abuse of discretion has been described as follows:

> "'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

After reviewing the record in this case, we conclude that the trial court did not err. Black was employed at Biotox Laboratories in Riverside, California. She received a degree in biology in 1966 and took an additional 19 units in pharmacology, chemistry, and toxicology. She has been licensed by the State of California as a clinical chemist scientist and a clinical toxicologist scientist for over 25 years. She is mandated by her

license to take 12 units of continuing education annually, and has attended "many different training classes," many of them "human performance workshops" discussing the behavioral effects of drugs. She had testified approximately 900 times as an expert; at least half of those times involved cases which were "driving related," involving alcohol or central nervous system stimulant drugs, including cocaine.

Appellant maintains that Black may have been qualified to testify to the amount of substance in a blood sample and the characteristics of that drug in the human body in general, but was unqualified to opine as to specific driving patterns. He relies on *People v. Williams* (1992) 3 Cal.App.4th 1326 to support this assertion. In *Williams*, this court addressed the admissibility of a police officer's opinion that a defendant was driving under the influence of alcohol based in part on his administering of a horizontal gaze nystagmus (involuntary eye movement) test. We held that the officer lacked sufficient expertise to attribute the results of the test to a particular cause because such testimony "rest[ed] on scientific premises well beyond his knowledge, training, or education." (*Id.* at p. 1334.) We held that the officer's testimony regarding the test should have been excluded.[1]

Contrary to appellant's contention, there is little similarity between the witness in *Williams* and the witness here. In *Williams*, the witness did not have the fundamental qualifications to render an expert opinion. Here, Black testified that she had extensive knowledge on driving while impaired, and specifically, driving under the influence of cocaine.

---

[1]Subsequent to *Williams*, the California Supreme Court held that the horizontal gaze nystagmus test was subject to proof of general acceptance by the scientific community under a "*Kelly-Frye*" analysis (see *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C.Cir. 1923) 293 Fed. 1013), and that, if such proof was presented, a police officer's evaluation of the test would be admissible without further expert testimony. (*People v. Leahy* (1994) 8 Cal.4th 587, 604, 611.)

In any event, even if we assume that Black was not qualified to testify regarding the effects of cocaine use in driving, her testimony on this subject was harmless. Other testimony, in particular Kitigawa's, also established that appellant's driving patterns were consistent with being under the influence of cocaine.

3. Change of Venue

Appellant contends the trial court erred when it denied his motion for change of venue and, as a result, he was denied his constitutional right to a fair trial. Appellant claims the motion should have been granted due to extensive publicity regarding the case. We disagree.

Appellant made his motion for change of venue prior to jury selection. Respondent argues that appellant failed to preserve this issue for appeal because appellant failed to renew his motion after voir dire. (*People v. Hart* (1999) 20 Cal.4th 546, 598.) Appellant attempts to distinguish *Hart*, claiming it applies to cases in which a change of venue motion is denied without prejudice, and not to his case where the motion was denied with prejudice. He argues in the alternative that, if we decide that the issue has been waived, he was denied effective assistance of counsel. We will address the issue on its merits.

Pursuant to Penal Code section 1033, subdivision (a), the court must grant a motion for change of venue if "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." The phrase "reasonable likelihood" in this context "means something less than 'more probable than not,'" and "something more than merely 'possible.'" (*People v. Bonin* (1988) 46 Cal.3d 659, 673, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) "In ruling on such a motion, as to which defendant bears the burden of proof, the trial court considers as factors the gravity and nature of the crime, the extent and nature of the publicity, the size and nature of the community, the status of the victim, and the status of the accused." (*People v. Proctor* (1992) 4 Cal.4th 499, 523.) "On appeal after a judgment following the denial of a change

of venue, the defendant must show both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it was reasonably likely that a fair trial was not in fact had." (*People v. Edwards* (1991) 54 Cal.3d 787, 807; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1213.)

> "With regard to the first part of the showing required of a defendant on appeal, we employ a standard of de novo review of the trial court's ultimate determination of the reasonable likelihood of an unfair trial. [Citations.] This requires our independent determination of the weight of the five controlling factors described above. [Citations.] With regard to the second part of the showing, in order to determine whether pretrial publicity had a prejudicial effect on the jury, we also examine the voir dire of the jurors. [Citations.]" (*People v. Proctor*, *supra*, 4 Cal.4th at pp. 523-524; accord, *People v. Hart*, *supra*, 20 Cal.4th at p. 598.)

In his motion for change of venue, appellant presented a criminology professor, Stephen Schoenthaler, who testified that he supervised a telephonic public opinion survey regarding appellant's case. The survey polled 150 potential jurors who lived in Mariposa County. Of the 150 surveyed, 76 stated that they had heard something about the collision; 64 stated that they had not; nine were not certain. Of the 80 questioned who knew "something" about the collision, 44 did not know the name of the victim and 76 did not know appellant's name. Of the 95 people asked, 57 stated that they were aware of appellant's race; of the 98 people asked, 58 said they had seen a picture of him. Schoenthaler testified that, when asked whether the person surveyed had formed an opinion on the guilt or innocence of appellant to a charge of vehicular manslaughter while appellant was under the influence, 56 out of the 101 asked stated that they had, and of those 56, 34 said that he was guilty beyond a reasonable doubt. Of the 97 who were asked whether they had read or heard that appellant confessed to using cocaine before the accident, 41 said they had.

Schoenthaler opined that there was a "reasonable likelihood" that appellant could not have a fair and impartial trial in Mariposa County. As to the relevant factors,

Schoenthaler opined that the nature and extent of publicity weighed heavily in support of a change of venue. He based his opinion on nine newspaper articles.[2] He testified that Mariposa County is the fifth smallest county in California, with approximately 18,000 residents. According to Schoenthaler, the newspaper articles published about the victim "paint[ed] a picture of empathy" and "gave the impression of the victim as an incredibly nice man, well-liked, well-respected, star athlete locally, holding many records," including, as recorded in the Mariposa Gazette, third in most touchdowns for his high school football team. The victim had "a very large extended family" living in the area. A word count of the newspaper articles revealed that the victim's name and characteristics appeared 50 times in 7,600 words. Four of the nine newspaper articles, including the victim's obituary, mentioned his personal history. The articles appeared in October and November of 2006 and in January of 2007.

Schoenthaler acknowledged that the nature and gravity of appellant's offense did not require a change of venue, but thought it weighed "moderately in the direction of a change of venue." He also acknowledged that the extent of publicity in appellant's case was relatively small compared to most cases in which a change of venue occurred.

Judge Wayne R. Parrish denied the motion, stating this case was "a garden variety vehicular homicide." The court held the gravity of appellant's offense "bears little weight," and it found the nature of the publicity was minimal. The court questioned the validity of the survey, because it did not know if the entire county was represented, and noted that Mariposa County included many small "distinct" towns.

We independently examine appellant's claim to determine whether he has met his burden of showing "'that denial of the venue motion was error (i.e., that it was reasonably likely a fair trial could not be had at the time the motion was made) ….'" (*People v. Hart, supra,* 20 Cal.4th at p. 598.)

---

[2]Schoenthaler testified that there were actually 11 articles, but he was unable to secure two of them.

An independent evaluation of the weight of the five controlling factors fails to establish the "reasonable likelihood" required for reversal. With respect to the gravity and nature of the crime, appellant argues that the head-on collision with alleged cocaine involvement was "a shocking homicide of a young man." We agree. The charged offense here was serious and attracted the attention of the media. But even in capital cases, there is no mandate to change venue. (*People v. Hart, supra,* 20 Cal.4th at p. 598.) Given that neither murder nor the death penalty was involved here, we agree with the trial court's conclusion that, though serious, the present charges were not of the utmost gravity. Accordingly, we find the gravity and nature of the crime do not weigh in favor of a change of venue.

We also find that neither appellant's status nor that of the victim favors a change of venue. The victim, as stated by the trial court, was not a figure of prominence and "in all probability" was "best known" in the Mariposa town area. "The victims were … local residents of no particular prominence, but became posthumous celebrities as a result of the media coverage …." (*People v. Daniels* (1991) 52 Cal.3d 815, 852; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1276 [victim, a well-liked police officer whose status was emphasized in news coverage, was not a prominent person in the community].)

And while appellant was, according to the trial court, "clearly an outsider," the race of appellant, who is African-American, was never reported in any of the articles submitted at the change of venue hearing. The absence of any evidence indicating local prejudices based on drug abuse or on race, and an absence of pretrial publicity calculated to excite local prejudices in that regard, weigh against the need for a change of venue. (*People v. Balderas* (1985) 41 Cal.3d 144, 179.)

With respect to the extent and nature of the publicity, we find the media coverage was mostly factual and not particularly inflammatory. Appellant urges that the pretrial publicity compelled a change of venue, as evidenced by the results of the telephone

public opinion survey. Appellant cites the survey figures that 70 percent of the community had knowledge of the case prior to trial and that 38.6 percent had prejudged appellant and decided that he was probably or definitely guilty. While we agree that the survey indicates approximately 37 percent of those surveyed (56 out of 150) opined that appellant was definitely or probably guilty, we question appellant's figure that 70 percent of the community had knowledge of the case. Early in his testimony, Schoenthaler stated that 70 percent of the community had knowledge of the case, but when questioned later, he agreed that 51 percent of those asked had some recognition of the case (76 out of 150). This latter figure is borne out by the survey figures. But the degree of exposure indicated by the survey was not greater than in other cases in which a change of venue has not been required. (See, e.g., *People v. Proctor*, *supra*, 4 Cal.4th at p. 524 [80 percent of those contacted heard of case and 31 percent formed opinion of defendant's guilt]; *People v. Jennings* (1991) 53 Cal.3d 334, 359, 361 [72 percent recalled offenses and 31 percent believed there was a strong case against defendant]; *People v. Coleman* (1989) 48 Cal.3d 112, 135 [46.3 percent recalled crime and 31.4 percent believed defendant was probably or definitely guilty].)

Moreover, while publicity was more extensive early on, media coverage was absent or minimal at the time of jury selection and trial in April of 2007. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1276; see also *People v. Hart*, *supra*, 20 Cal.4th at p. 600 [fact that articles printed well before trial commenced weighed against change of venue].) We note that the majority of the publicity, five articles, appeared within the first few weeks following the collision in October of 2006. Four other articles appeared in January of 2007 at the time of appellant's preliminary hearing. "'Through the passage of time, any potential prejudice was … significantly reduced.' [Citations.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1237 [denial of motion for change of venue upheld where substantial media coverage subsided several months before venue motion].)

The only remaining factor—size and nature of the community—possibly favored a change of venue in this case. "The key consideration is 'whether it can be shown that the population is of such a size that it "neutralizes or dilutes the impact of adverse publicity."'" (*People v. Weaver* (2001) 26 Cal.4th 876, 905.) The evidence presented on the motion was that Mariposa had a population of 18,000 and was the fifth smallest county in California. In *People v. Proctor*, *supra*, 4 Cal.4th 499, a murder took place in "a small mountain community located 35 miles east of Redding in Shasta County" (*id*. at p. 514) and the population of Shasta County at the time was approximately 122,100, ranking it 28th out of 58 counties in the state. (*Id*. at p. 525.) The court found this factor weighed "somewhat in favor of a change of venue, [but] it is not determinative." (*Id.* at p. 526.) Here, too, we find that the size of the community weighed somewhat in favor of a change of venue, but it is not determinative.

Applying the above five factors, we conclude that appellant has not shown that the lower court erred in denying his pretrial venue motion. Even if the court erred in denying the motion, however, reversal is not required because appellant has failed to show that it is reasonably likely he did not receive a fair trial. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1213.)

In conducting this review "we consider the jury voir dire to determine whether the jurors may have been prejudiced by pretrial publicity surrounding the case, bearing in mind that no presumption of a deprivation of due process of law arises from juror exposure to publicity concerning the case." (*People v. Proctor*, *supra*, 4 Cal.4th at pp. 526-527.) The court endeavored to expedite the jury selection process and to weed out any prospective jurors who might have had significant knowledge about appellant or the collision by having each prospective juror complete a questionnaire. The potential jurors were asked to "list separately and in detail everything you have heard about the case" including all facts about the collision, its causes, and "everything you have heard about [appellant] and … the decedent, Thomas Russell Holt." The potential jurors were also

asked to state any relationship, friendship or acquaintance they had with Mr. Holt and his family, and "the sources and dates of all of the information you have about the case."

Only two of the jurors who were ultimately selected to hear the trial had any previous knowledge of the case: one knew that there had been an accident, the other read one newspaper article about the case. Further, the court obtained a commitment from the jurors that they would render a verdict based only on the evidence presented and the instructions of the court. No suggestions to the contrary appear in the record. (*People v. Sully*, *supra*, 53 Cal.3d at p. 1238; see also *People v. Hart*, *supra*, 20 Cal.4th at p. 600.)

Appellant argues that the survey, the juror questionnaire asking prospective jurors about their knowledge of the case, and voir dire showed that many prospective jurors had heard or read about the case. He specifically cites to one prospective juror, No. 56879, who knew the victim's family and attended the victim's funeral. According to appellant, juror No. 56879 was one of eight of the 65 prospective jurors with knowledge of the case who was not excused by stipulation. But this argument ignores the answers given by the jurors who actually served in the case. (See *People v. Proctor*, *supra*, 4 Cal.4th at pp. 526-527 and cases cited therein.) It is also pertinent to note that appellant did not challenge a single seated juror for cause and he did not exhaust his peremptory challenges. (*People v. Dennis* (1998) 17 Cal.4th 468, 524 [failure to exhaust peremptories is strong indication that jurors were fair and that defense itself so concluded].)

Having considered all the relevant factors, we conclude that there was no reasonable probability that appellant would not receive a fair trial in Mariposa County, and no reasonable probability that he did not in fact receive a fair trial in that county.

4. Abstract of Judgment

Appellant contends that remand to the trial court is necessary so that it can prepare an amended abstract of judgment that separately lists the statutory basis for all fines, fees, and penalties imposed at sentencing. Respondent agrees, as do we.

At sentencing, the trial court stated appellant was to:

> "[P]ay a restitution fine of $4,000 under Penal Code section 1202.4, calculated at $200 per year times offense. [Appellant] shall also pay a matching restitution fine plus penalty assessments in a similar amount of $4,000, similarly calculated, stayed upon his successful completion of parole. [¶] [Appellant] shall also pay an Alcohol Program Fund fee plus penalty assessments in the amount of $150, a $3,000 Vehicle Code fine."

The abstract of judgment lists the Penal Code sections 1202.4, subdivision (b), and 1202.45 fines, both in the amount of $4,000.[3] It also states appellant is to "pay Alcohol Program Fee plus penalty assesments [*sic*] of $150 per VC 23649(a),"[4] and "… fine plus penalty assessments in amount of $3,000 per VC 23554."[5] The minute order for sentencing reflects the same amounts.

In *People v. High* (2004) 119 Cal.App.4th 1192, the court addressed the need for clarity in ordering fines, fees and assessments:

> "Although we recognize that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts. All fines and fees must be set forth in the abstract of judgment. (*People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1332 [laboratory fee]; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1080 [restitution fine].) The abstract of judgment form used here, Judicial Council form CR-290 (rev.

---

[3]The abstract of judgment does not state any penalty assessment connected to the Penal Code sections 1202.4 and 1202.45 restitution fines, despite the trial court's reference to them at the sentencing hearing. Though it appears to have amounted to harmless error, we must note that the trial court erred. Penalty assessments do not attach to restitution fines. (Pen. Code, § 1464, subd. (a)(3)(A).)

[4]Vehicle Code, section 23649, subdivision (a), provides that "in addition to any other fine or penalty assessment, there shall be levied an assessment of not more than one hundred dollars ($100) upon every fine, penalty, or forfeiture imposed and collected by the courts for a violation of Section … 23153 …."

[5]Vehicle Code section 23554 provides that a person convicted of a first violation of section 23153 shall be punished by "a fine of not less than three hundred ninety dollars ($390) nor more than one thousand dollars ($1,000)." The probation report states "Pursuant to Vehicle Code Section 23554, [appellant] shall pay a fine of up to $1,000, but not less than $390, plus penalty assessments. A $1,000 fine plus penalty assessments of $2,000, for a total of $3,000 is recommended." (Underscoring omitted.)

> Jan. 1, 2003) provides a number of lines for 'other' financial obligations in addition to those delineated with statutory references on the preprinted form. If the abstract does not specify the amount of each fine, the Department of Corrections cannot fulfill its statutory duty to collect and forward deductions from prisoner wages to the appropriate agency. (*Hong*, *supra*, 64 Cal.App.4th at pp. 1078–1079.) At a minimum, the inclusion of all fines and fees in the abstract may assist state and local agencies in their collection efforts. (Pen. Code, § 1205, subd. (c).)" (*People v. High*, *supra*, at p. 1200.)

The court in *High* stated that it would "direct the trial court to correct the cited clerical errors," and in the disposition it remanded the cause with directions to "separately list, with the statutory basis, all fines, fees and penalties imposed on each count …." (*People v. High*, *supra*, 119 Cal.App.4th at pp. 1200-1201.)

We agree with the parties that remand is necessary here. Neither the oral pronouncement of judgment, the sentencing minute order, nor the abstract of judgment specified the statutory basis for all fines, fees, and penalties imposed. Respondent notes that the probation report lists Penal Code section 1464 as the statutory basis for the penalty assessments. We find no reference to section 1464 in the probation report but agree with respondent that, even if this reference were included in the probation report, that report is not a part of the abstract of judgment. Further, we note section 1464 adds a $10 "state penalty" for every $10 of fine, penalty, or forfeiture imposed, and thus does not account for the addition of $2,000 in "penalty assessments" to a $1,000 fine. Nowhere in the probation report, the abstract of judgment, or the trial court's pronouncements is Penal Code section 1465.7 or Government Code section 76000 mentioned.

We will remand this matter to the trial court for correction of the abstract of judgment.

DISPOSITION

The judgment is affirmed. The cause is remanded to the trial court with directions to prepare an amended abstract of judgment in accordance with this opinion and to

forward a certified copy of the abstract to the Department of Corrections and Rehabilitation.

_____
DAWSON, J.

WE CONCUR:

_____
CORNELL, Acting P.J.

_____
KANE, J.